# STATE OF MICHIGAN

# COURT OF APPEALS

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JACOB E. WHITE, M.D., P.C., and JACOB E. WHITE, M.D.,

Plaintiffs-Appellants,

v

AUTO-OWNERS INSURANCE COMPANY,

Defendant-Appellee,

and

LECHOLA OGBURN, as Personal Representative of the Estate of CAROLYN OGBURN, Deceased,

Defendant.

UNPUBLISHED
March 16, 2006

No. 265380
Wayne Circuit Court
LC No. 04-434592-CK

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JACOB E. WHITE, M.D., P.C., and JACOB E. WHITE,

Plaintiffs,

v

AUTO-OWNERS INSURANCE COMPANY,

Defendant-Appellee,

and

LECHOLA OGBURN, as Personal Representative of the Estate of CAROLYN OGBURN, Deceased,

Defendant-Appellant.

No. 265389
Wayne Circuit Court
LC No. 04-434592-CK

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Before: Schuette, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

In this consolidated appeal, plaintiffs, Jacob E. White, M.D., and his professional corporation, Jacob E. White, M.D., P.C., along with codefendant, LeChola Ogburn, as personal representative of the Estate of Carolyn Ogburn, appeal as of right from an order granting summary disposition in favor of defendant Auto-Owners Insurance Company in this action for coverage under an insurance policy. We affirm.

## I. Background

This cause of action arises out of the death of the Ogburn Estate's decedent, Carolyn Ogburn, as a result of cancer originating from a malignant tumor in her right breast. Apparently, Ogburn was a patient of United Community Hospital ("UCH") in Detroit when she complained of "a painful mass in her right breast" and was scheduled for a biopsy. Dr. White was a physician with surgical privileges at St. John Detroit Riverview Hospital in Riverview, Michigan. Because UCH had an accumulation of scheduled surgeries, it enlisted the assistance of Dr. White to provide surgical services to several indigent patients, including Ogburn. Dr. White agreed to perform Ogburn's biopsy at Riverview Hospital for no fee as a professional courtesy to a "community hospital" that "meant a lot to [him] over the years."

According to Dr. White, part of the arrangement with UCH was an agreement that he was not to be responsible for any long-term care of the patient and that post-surgery care, including the pathology report and follow-up, were to be the responsibility of UCH. After performing a breast biopsy, Dr. White sent the tissue to pathology at the hospital for examination. While Dr. White contended that he told the pathologist, Dr. Michael Kelly, to send the pathology report to UCH and its surgical clinic, Dr. Kelly testified that he received no such instruction from Dr. White or anyone else. The examination showed that Ogburn had a malignant tumor in her right breast. Dr. Kelly attempted to contact Dr. White with the results on two occasions. It was hospital procedure to place the physician's copy of the pathology report in his designated box at the hospital, and the pathology manager at the time was "90 percent" certain that she placed Ogburn's report in Dr. White's box the morning after the report was generated. However, Dr. White testified that he did not receive a copy of the pathology report until at least approximately a year after the surgery. Dr. White explained that he never requested a copy because of the special arrangement that he had made with UCH.

Dr. White and his professional corporation are the defendants in a wrongful death action brought by the Ogburn Estate. According to the underlying complaint, Ogburn was not notified of the diagnosis of cancer until nearly one year after the biopsy, when she was found to have extensive cancer and underwent a modified radical mastectomy of her right breast. Ogburn had subsequent related surgeries and eventually died on January 8, 2003. The Ogburn Estate alleged claims of "medical malpractice" and "nonprofessional negligence" against Dr. White and his professional corporation. Apparently, the malpractice claim was settled and the only remaining issue relates to the "nonprofessional negligence" claim against plaintiffs. In the instant action, plaintiffs sought a declaratory judgment against Auto-Owners to determine that a policy of insurance issued by Auto-Owners would cover the alleged liability of plaintiffs to the Ogburn Estate. The trial court granted summary disposition in favor of Auto-Owners, concluding that there was no obligation to provide coverage because the policy excluded coverage for matters alleged in the underlying suit.

## II. Analysis

On appeal, both plaintiffs and the Ogburn Estate contend that the trial court erred in ruling that there was no coverage under the insurance policy issued by Auto-Owners to plaintiffs. We disagree.

Auto-Owners moved for summary disposition under MCR 2.116(C)(8) and (10). However, because it appears that the trial court evaluated documents beyond the pleadings in ruling on the motion for summary disposition, it is appropriate to analyze the trial court's decision under MCR 2.116(C)(10). See *Gibson v Neelis*, 227 Mich App 187, 190; 575 NW2d 313 (1997).

We review de novo a trial court's decision to grant or deny a motion for summary disposition under MCR 2.116(C)(10). *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). In evaluating such a motion, we must consider the whole record in the light most favorable to the nonmoving party, including affidavits, pleadings, depositions, admissions, and other evidence offered by the parties. MCR 2.116(C)(10); MCR 2.116(G)(4) and (5). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Moreover, we review de novo an issue involving the proper interpretation of an insurance contract. *Allstate Ins Co v McCarn (After Remand)*, 471 Mich 283, 288; 683 NW2d 656 (2004).

As an initial argument, plaintiffs and the Ogburn Estate assert that the determination of coverage rests on whether the underlying claim sounds in medical malpractice or ordinary negligence. They cite *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411; 684 NW2d 864 (2004), as support for their contention that the claim is one of ordinary negligence and is covered under the policy. However, in *Shuler v Michigan Physicians Mut Liability Co*, 260 Mich App 492, 527; 679 NW2d 106 (2004), where the insurance policy contained an exclusionary provision similar to the provision in the instant policy, this Court held that the proper inquiry was not whether certain conduct constitutes medical malpractice, but whether, as the language of the exclusionary clause indicates, "the injury resulted from rendering or failing to render a professional service." Accordingly, the pivotal question on appeal is not the difference between medical malpractice and ordinary negligence, but whether the insurance policy excludes coverage for the alleged liability because it was a failure to render a health service.

An insurance policy is to be enforced in accordance with its terms. *McCarn*, *supra* at 288. Unless the terms are specifically defined in the policy, the terms are given their commonly used meanings. *Id.* The determination of the extent of coverage is a separate inquiry from whether coverage is cancelled by an exclusion. *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155, 172-173; 534 NW2d 502 (1995). While exclusionary clauses in insurance policies are strictly construed in favor of the insured, clear and unambiguous exclusions must be given effect because an insurance company cannot be held liable for a risk it did not assume. *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 567; 489 NW2d 431 (1992).

The business owners policy issued to plaintiffs includes the following exclusion:

"Bodily injury" or "property damage" due to rendering or failure to render any professional service. This includes but is not limited to:

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(2) Preparing, approving, or failing to prepare or approve maps, drawings, opinions, reports, surveys, change orders, designs or specifications:

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(4) Medical, surgical, dental, x-ray or nursing services or treatment:

(5) Any health service or treatment.

We conclude that the exclusion in the policy at issue is unambiguous because it clearly precludes coverage for "bodily injury" or "property damage" arising out of the "rendering or failure to render any professional service." Therefore, we must determine whether the injury to Ogburn resulted from the "rendering or failure to render any professional service," including "medical services or treatment" or "any health service or treatment."

The services at issue on appeal are designated "nonprofessional" services and are listed in counts eight and nine of the Ogburn Estate's complaint. Count eight of the underlying complaint alleges that Dr. White's professional corporation was negligent for the failure of Dr. White to properly retrieve, transport, maintain and deliver the pathology report as part of the nonprofessional duties of the business. Similarly, the office staff allegedly failed to properly retrieve telephone and facsimile messages, place messages in the appropriate locations and collect, sort, file and forward the mail containing the report to the proper recipient. Count nine in the underlying complaint alleges that Dr. White, individually and through his employees, was negligent based on the same actions or inactions enumerated in the previous count. Furthermore, the complaint alleges that Dr. White and/or his staff proximately caused Ogburn "to be denied timely access to pathological information which would have led to further timely treatment for her cancer, which caused . . . unnecessary destruction of her body tissue, more invasive medical treatments, emotional trauma attributable to her unnecessarily worsened medical condition and pain and suffering attributable to her unnecessarily worsened physical condition, and death."

Plaintiffs assert that the substance of the underlying allegations is that plaintiffs are liable "for losing records" and that "[m]isplacing records is an administrative function and not a health care function." While a misplaced record or a telephone or facsimile message may have initiated the problem, those actions alone did not cause Ogburn's injury. "[I]t is necessary to focus on the basis for the injury and not the nomenclature of the underlying claim in order to determine whether coverage exists." *Allstate Ins Co v Freeman*, 432 Mich 656, 662-663; 443 NW2d 734 (1989) (citation omitted). The injury that Ogburn suffered was the result of improper follow-through after a medical procedure, which encompasses the failure to render a medical service. The substance of the claim is that Dr. White is liable for failing to inform Ogburn or the appropriate health care provider of the biopsy results so that Ogburn could obtain timely treatment. According to the underlying complaint, Dr. White had a professional duty as Ogburn's physician to obtain, review and report the biopsy findings. Because some portions of that duty included clerical tasks does not change the overall nature of the duty. In addition,

Michigan courts have held that "professional services" may include the business and technical activities conducted by the insured company. See *American Fellowship Mut Ins Co v Ins Co of North America*, 90 Mich App 633, 636-638; 282 NW2d 425 (1979) (stating that the "professional services" exclusion of a life insurance contract referred to any business activity conducted by the insured company); see also *Centennial Ins Co v Neyer, Tiseo & Hindo, Ltd*, 207 Mich App 235, 238-239; 523 NW2d 808 (1994). Furthermore, it is irrelevant that some portions of the clerical duties may have been delegated to Dr. White's staff. Dr. White, as the licensed physician, is ultimately responsible for the actions of his staff. See *Shuler*, *supra* at 528 ("Properly supervising employees to prevent patient harm is part of providing health services . . . ."). Because the injury and liability arise out of the failure to render medical service, we hold that the trial court did not err in concluding that Auto-Owners had no obligation to provide coverage to plaintiffs in the underlying action.

Affirmed.

/s/ Bill Schuette
/s/ Christopher M. Murray
/s/ Pat M. Donofrio